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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

Number 497

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ROWENA THORNTON, *Petitioner*

v.

CITY OF PORTLAND, OREGON, *Respondent*

■

Petition for Writ of Certiorari to the Supreme Court of Oregon

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Petition for Writ of Certiorari to the Supreme Court of Oregon

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Rowena Thornton, presents this her petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement*

The facts and problems presented for review herein are similar to those discussed by this Court in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158. But the issues, involving as they do "sacred private interests, basic in a democracy", are not disposed of by the *Prince* case because here are involved questions of vital moment which can never be thrust beyond judicial scrutiny by any one single pronouncement. Here again there is a clash of private constitutional rights of freedom of worship as against state police authority and the delicate task of resolving the conflict de-

volves upon this Court. The facts involved in this controversy, which arose prior to the *Prince* case, raise issues not previously disposed of and present a much more compelling situation with respect to those questions which were discussed in the majority opinion in the *Prince* case. Here the Supreme Court of Oregon has sanctioned the criminal sentence imposed on a mother solely upon the authority of this Court's decision in the *Prince* case and has wholly failed to perform the "delicate and difficult task [which] falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights". (*Schneider* v. *New Jersey,* 308 U. S. 147, 160) Petitioner now applies to this Court of last resort for a review of the facts in her case, and a reconsideration of the principles announced in the *Prince* decision, in order that the good ends of justice may be accomplished.

2. *Opinion of the Court Below.*

The opinion of the Supreme Court of Oregon is reported at — Oreg. —, 49 P. 2d 972, and is printed in the record at pages 254 to 258.

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, 28 U. S. C. 344 (b).

4. *Timeliness of the Petition.*

The judgment of the Supreme Court of Oregon was entered on June 27, 1944. [258]* The petition for writ of certiorari is filed within three months from the date of the entry of such judgment in said court.

5. *Ordinance Involved.*

The constitutionality of Section 16-903 of Ordinance

* Numbers hereinafter appearing in brackets refer to pages in the printed record in this case.

No. 76339 of the City of Portland, Oregon, as it has been construed and applied to the activity of petitioner and her minor daughter, is involved.

6. *Constitutional Provisions Involved.*

The First and Fourteenth Amendments to the United States Constitution protecting the right of freedom of worship are relied upon.

7. *Questions Presented.*

(1) Does the conviction deprive petitioner of liberty and property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, in that the judgment of conviction was entered without a finding that respondent

(a) clearly established by evidence the "existence of facts supporting the legislative judgment" so as to overcome the presumption of unconstitutionality which attaches to this ordinance by reason of its operating as a prima facie denial and infringement of the constitutional right of freedom of worship, and

(b) justified the operation of the ordinance by evidence clearly establishing that it was a reasonable means to the end sought to be accomplished and that it was not arbitrary, unreasonable or oppressive?

(2) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's right to educate, teach and direct the spiritual welfare of her daughter, to maintain a family and to discharge her moral obligations as mother while the child is denied the right to the benefits of such relationship, all contrary to the First and Fourteenth Amendments to the United States Constitution?

(3) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's and her daughter's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience,

contrary to the First and Fourteenth Amendments to the United States Constitution?

(4) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's and her daughter's privileges, rights and immunities secured by the Constitution in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

(5) Do the judgments of the courts below deprive petitioner of her liberty and property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution, in that there is an absence of evidence in the record to establish that she violated the ordinance in question?

8. *How the Issues were Raised.*

At the trial in the Municipal Court of the City of Portland, [227-228] and later, at the trial in the Circuit Court for Multnomah County, [140-142] petitioner filed a motion to dismiss and for acquittal [140-142] raising, among other things, the constitutional questions heretofore listed. These grounds were considered and discussed by the trial court [180-226] and later by the Supreme Court of Oregon [256-258] but in both instances were decided adversely to petitioner.

9. *Statement of the History of the Case and the Facts.*

HISTORY

Petitioner, on March 10, 1942, was charged in the Municipal Court of the City of Portland with a violation of Ordinance No. 76339 of said city. After a trial was had on her plea of "not guilty", she was convicted and fined $25, in default of which, confinement in the City Jail of not more than 12½ days was to be imposed. [2] An appeal was timely taken to the Circuit Court for Multnomah County, and after a trial *de novo* before the court without a jury, petitioner

was again convicted and the same sentence imposed. [226] Petitioner then appealed to the Supreme Court of Oregon, but this court, after considering the briefs and argument of counsel, on June 27, 1944, affirmed the conviction. [258-259]

FACTS

Rowena Thornton is one of Jehovah's witnesses and an ordained minister of the gospel. [9-10] She explained that her work as a "witness, preacher and evangelist" was prophesied and described by Isaiah, another of Jehovah's witnesses who long ago declared:*

> '"Let all the nations be gathered together, and let the peoples be assembled: who among them can declare this, and show us former things? let them bring their witnesses, that they may be justified; or let them hear, and say, It is truth. Ye are my witnesses, saith Jehovah, and my servant whom I have chosen; that ye may know and believe me, and understand that I am he: before me there was no God formed, neither shall there be after me. I, even I, am Jehovah; and besides me there is no saviour. I have declared, and I have saved, and I have showed; and there was no strange god among you: therefore ye are my witnesses, saith Jehovah, and I am God." And that is what we are, Jehovah's witnesses.' [39-40]

She has a daughter, Brooke Thornton, eleven years of age, whom she has trained "in the nurture and admonition of the Lord" (Ephesians 6:4) as one of Jehovah's witnesses. [47-48, 81]

As one of Jehovah's witnesses, petitioner appeared regularly each week on the streets of the business section of Portland, Oregon, to preach the gospel of God's kingdom by public distribution of the *Watchtower* and *Consolation* magazines. [14, 19, 41, 45] On Saturday afternoon, March 7, 1942, petitioner, as was her custom, appeared on the south-

* Isaiah 43:9-12, *American Standard Version.*

west corner of Fourth and Stark streets, accompanied by her daughter, Brooke. Each of them carried a cloth magazine bag, hung from the shoulder by means of a strap. On the bag the following words were printed: "*The Watchtower*—Explains the Theocratic Government—5c per copy." [20-21; 78-79; 249; Pl. Ex. 3] Brooke took a position on the edge of the sidewalk a few feet from her mother and they began their work. [16, 94] Petitioner stated that she always kept very close surveillance over her daughter while they were on the street. [47]

As the normal flow of pedestrian traffic passed by them, petitioner and her daughter held in their hands copies of the two magazines so that they were visible to the passers-by. [18, 20, 77-79] Petitioner repeatedly stated when on trial that she and her daughter were not "selling" the magazines, explaining that the magazines were distributed to persons desiring same upon their request, but that if such persons desired to contribute five cents to assist in printing more like magazines, such contributions would be accepted and turned over to the Watchtower Bible & Tract Society. [21-26] This was verified by her daughter. [80] Petitioner stated that most of the magazines she and her daughter distributed were given away without receipt of contributions. [21] In such instances, petitioner carried the expense of approximately two and one-half cents per copy herself. [25, 114] This arrangement, used by Jehovah's witnesses generally, was clarified by Norman Larson, the *company servant* (supervising minister) of the Portland, Oregon, congregation of Jehovah's witnesses. [112-115] Brooke Thornton testified that she gave all the contributions she received to her mother, who "turns it in and helps publish more magazines". [78]

When asked what she was doing on the street with her mother on the occasion in question, Brooke answered: "I was preaching the gospel of the Kingdom which Christ Jesus taught all Christians to pray for. . . . I was there because I wanted to serve Jehovah. . . . To obey Jehovah

God. . . . At Acts 20: 20 it says to teach 'publicly and from house to house'. . . . I read it out of the Bible myself." She further testified that if she failed to obey God's commandments she "would not live in the Kingdom where all animals should be my friends. As it says in the Bible, 'The lion will lay down with the lamb.' [Isaiah 11: 6-9] I would not have everlasting life. . . . I would not have if I didn't obey God". [93]

It appears from the testimony that the *Watchtower* and *Consolation* magazines are not commercial publications. Both magazines are devoted exclusively to "Christianity and Christian teachings", and contain no commercial advertising. [54] *The Watchtower,* issued semi-monthly, deals entirely with Scriptural discussions of great concern to the people seeking knowledge of God's purposes toward mankind. [27] *Consolation,* A Journal of Fact, Hope and Courage, publishes news uncensored by any political, religious or commercial body, and contains Bible treatises as well. [27, 77] Both magazines were introduced in evidence.

Jehovah's witnesses look to the Watchtower Bible & Tract Society, a non-profit, charitable corporation, chartered under the laws of the State of New York, as their earthly governing body. The charter of this corporation [Ex. D. 108-110] shows that the sole corporate purpose of said Society is to disseminate information of and concerning God's Kingdom to people of good-will. This is accomplished by means of the printed page, radio, word of mouth, and various other means of advertising, all of which is carried on by Jehovah's witnesses in the public interest without hope of pecuniary return to any individual or group of individuals. [52-54, 119]

The uncontroverted evidence shows that both petitioner and her daughter are ordained ministers of Almighty God. Certificates of ordination from the Watchtower Society for each of them were introduced in evidence and marked Exhibits A and B. [10, 80, 115] The matter of ordination was explained by petitioner in these words:

> "Ordination simply means to be appointed, and God did not set any age limit on who he would appoint to be his witnesses. He says in John 15:16 that, 'Ye have not chosen me, but I have chosen you, that you might bring forth fruit.' And, of course, if we bring forth good fruit, as Jesus did, we are bringing forth fruits of the Kingdom. And in Psalm 8:2, he says, 'Out of the mouth of babes and sucklings I have ordained strength because of thine enemies, that thou mightest stop the mouth of the enemy and the avenger.' So the Lord gave these children strength to do what men had an opportunity to do but failed to do because of the fear of man." [29]

Petitioner also pointed out that Jesus, Timothy and the prophet Samuel were all ordained by Jehovah to preach while yet very young. [32, 42-43] Brooke Thornton testified concerning this matter: "When I got the knowledge of the Kingdom, that is when I became an ordained minister. . . . My mother showed me in the Bible where it said that, and it was up to me to make the decision." [101]

Although Brooke usually expressed her desire to accompany her mother on Saturday afternoons when she went to carry on her preaching activity by street distribution of the magazines, petitioners said that she permitted it only when the weather was fair. [16-17, 32, 47] On the afternoon in question, the weather bureau report received in evidence [Ex. C, 17, 18] showed that the weather was fair and mild. Petitioner further testified that she never allowed Brooke to stay home from school to engage in these ministerial activities, but always arranged for her to perform her service to God at times other than during school hours. [35-36] There was no contention on the part of the City in the courts below that petitioner forced her daughter to engage in the ministerial work but it was admitted that Brooke performed such service of her own accord with petitioner's permission. [82-91]

Rowena Thornton testified that Jehovah God was using His witnesses on the earth today to warn the people of the impending disaster of Armageddon in which God would for ever throw down all wickedness and establish His Theocratic Government. Speaking of this Theocratic Government Norman Larson said: "Theocracy is God's Government. The word 'theocracy', as you know, is taken from the Greek 'theo', meaning God, and 'kratos' meaning government. And God's Government is prophesied in the Garden of Eden, and it is prophesied down through the ages by all the prophets. You see prophesied the coming of the King. He came and was rejected. Well, he is coming again, and it is time now. We are in the transition period from the rule of Satan to the rule of Christ." [123] Rowena Thorton enlarged upon this matter to show her purpose in engaging in the ministerial work:

> "Absolutely a new government. The Lord says, 'Lo, I create a new heaven and a new earth' [Isaiah 65:17], a new heavenly rule and a new earthly rule. Satan has been the invisible ruler of this present evil world, as all the facts today testify. A new Theocratic Government, which Jesus taught us to pray for [Matthew 6:9, 10], is coming in, and that is why the nations are in the terrible turmoil they are now in world-wide. . . . The Lord says, 'The whole world lieth in the hand of the wicked one.' [1 John 5:19] He says, 'My Kingdom is not of this world; if my Kingdom were of this world, then would my servants fight, that I should not be delivered unto the Jews; but my Kingdom is hence.' [John 18:36] . . . There is many sincere people held in these religious systems that don't know one thing about their Bible, and God is now giving them the opportunity to know. He is giving them a chance to know what the message of the Bible contains, and if they do learn they have got to get out of religion [Revelation 18:4], because religion has never saved a nation yet." [56-58]

Reasons Relied on for Allowance of Writ

The petition for writ of certiorari should be granted in this case because of the fundamental constitutional issues of importance presented. Briefly stated, these issues involve:

(*a*) *Presumption of unconstitutionality and burden of proof.*

To general legislation governing the affairs of mankind, there attaches a strong presumption of constitutionality, and the burden is placed on the individual attacking the constitutional validity of the statute to overcome this presumption. There is, however, an important exception to this rule. The human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment, are presumed to be invulnerable, and any attempt to sweep away those freedoms is prima facie invalid. Any restriction or prohibition, therefore, must be justified by those who deny that the freedoms have been unlawfully invaded. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Busey* v. *District of Columbia,* 138 F. 2d 592; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152.

In this case, the courts below, under the guise of police authority, have admittedly construed and applied the ordinance in such a manner as to infringe and deny two of the most fundamental freedoms secured to the people: (a) parental freedom to rear children in accordance with God's Word, and (b) children's freedom to worship God by distribution of Bible literature on public streets. These are serious constitutional freedoms and cannot be lightly brushed aside. See pages 13-15, infra. Notwithstanding this, however, the courts below sanctioned the application of the ordinance without requiring the respondent City of Portland to establish by evidence the "existence of facts supporting the legislative judgment". The trial court improper-

ly assumed the existence of such facts because petitioner had not convinced the court beyond a reasonable doubt that there was "no reasonable basis for the same". [220-221] Although the question was not discussed in the opinion of the Supreme Court of Oregon, said opinion was based on this Court's pronouncements made in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158. It is significant to note that the majority opinion in the *Prince* case recognizes this contention, but wholly ignores the application of the rule in its decision, and violates the rule by presuming, *ipse dixit,* the existence of facts supporting the legislative judgment. See Mr. Justice Murphy's dissenting opinion in the *Prince* case. Therefore, not only are the rulings of the courts below in conflict with previous applicable decisions of this Court, but also there is an inconsistency between the rule applied in the *Prince* case and that recognized in *United States* v. *Carolene Products Co.,* 304 U. S. 152, and *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. These are, in themselves, sufficient reasons for the granting of the writ.

(*b*) *Inapplicability of "rational basis" test.*

This Court properly said in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640, "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." See also *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152. The burden was therefore upon the respondent City to show that the ordinance was necessary in order to prevent *clear and present danger* to some interest it could lawfully protect. The respondent wholly failed to discharge this burden,

but, following this Court's pronouncement in the *Prince* case, the court below filled in this gap in the case against petitioner by presuming that the ordinance was a "proper exercise of the police power in that it tended to protect the health and moral welfare of children of tender years". [258] It is respectfully urged that it is not the proper function of the judiciary to settle complicated social questions such as the child welfare problem here presented by its own presumption and without the assistance of competent evidence in the record. There must be a positive finding based on competent evidence that the ordinance was necessary in order to protect the child from a *clear and present danger* of substantial injury to its health or welfare and that it was a reasonable measure to this end. To settle this important and basic question of judicial procedure the writ of certiorari should be granted.

(*c*) *No evidence of guilt in record.*

The Supreme Court of Oregon ruled that the finding of the trial court that petitioner's daughter was "selling" the magazines on the street was conclusive, and hence did not consider the evidence on that question, but ruled that petitioner came within the ordinance. [255] The work of Jehovah's witnesses precisely similar to that involved here has come before this Court for close scrutiny on many occasions. In *Murdock* v. *Pennsylvania,* 319 U. S. 105, 110, this matter was carefully considered and it was found that the evangelistic work of Jehovah's witnesses was not transformed into commercial selling merely because money transactions were involved. The Oregon Supreme Court's characterization of their work is plainly a "distortion of the facts of record". See also *Follett* v. *McCormick,* 321 U. S. 573, decided last term. The conclusion that petitioner's daughter was "selling" is not the ascertainment of the kind of fact that precludes consideration by this Court. *Baumgartner* v. *United States,* 64 S. Ct. 1240, 1244, and

cases there cited. The conviction of petitioner, being based on this "finding", deprives her of her liberty and property without due process of law, and is contrary to the applicable decisions of this Court.

(*d*) *Infringement of right of parental control of children.*

Without justification, the City of Portland has undertaken to prevent a mother from teaching her daughter, under the age of 18, the way she should worship Almighty God. This action has been sanctioned on the basis of this Court's opinion in the *Prince* case. Because there is a fundamental inconsistency between these rulings and the previous rulings made in *Pierce* v. *Society of Sisters,* 268 U. S. 510, and *Meyer* v. *Nebraska,* 262 U. S. 390, the writ of certiorari should be granted. The doctrine of *parens patriae* has been extended far beyond its proper constitutional scope.

(*e*) *Infringement of child's right to benefit from parental control.*

Not only does this decision operate to prevent the mother from teaching the child in the way it should go, but it likewise makes it impossible for a girl under the age of 18 years to look to her parents for truthful and reliable counsel as to the proper manner to worship God. This deprives the child of proper preparation for "obligations the state can neither supply nor hinder", namely, her obligation to her Creator. In the absence of a *clear and present danger,* which results from the activity of worship, this is an under infringement of the child's constitutional rights.

(*f*) *Infringement of freedom of worship.*

It is noticeable that the ordinance, as it has been construed and applied to petitioner's daughter, is not an ordinance regulating her conduct in distributing the magazines on the street, but is an absolute prohibition on such activity.

The respondent City has, in effect, declared by this ordinance that girls under the age of 18 cannot worship God except as the City, as *parens patriae,* shall approve. The difference between the prohibition here and the one struck down in *Lovell* v. *Griffin,* 303 U. S. 444, is that here the ordinance applies only to an age group and does not so much as allow for the activity to be carried on with an administrative permit. Justification for the restriction is sought under the guise of protecting the health and welfare of children. Speaking of the sanction of such laws announced by the majority of this Court in the *Prince* Case, Mr. Justice Jackson, dissenting, said, " . . . a foundation is laid for any state intervention in the indoctrination and participation of children in religion provided it is done in the name of their health and welfare." Truly the operation of this ordinance cuts across the most valuable right of the youngster, that is, his right to learn to worship Jehovah God and thus gain life everlasting. Moreover, the divine obligation of the parents to rear their children in the "nurture and admonition of the Lord" is greatly impaired and infringed by this decision. The ordinance is an infringement because its harsh operation has been sanctioned by the courts below without any evidence of a *clear and present danger* to the child's welfare on account of the activity. *Bridges* v. *California,* 314 U. S. 252, 262.

(*g*) *Infringement of equal protection clause.*

As construed and applied by the court below, the ordinance discriminates against Jehovah's witnesses and their children in that it arbitrarily prohibits girls under 18 years of age and boys under 10 years of age from worshiping God by distribution of Bible literature on the streets, as it is their constitutional right to do, and at the same time allows other children to wander about the streets having no occupation. The classification thus made is not upon any ground of difference having a fair and substantial relation to the police powers of the respondent city; therefore all persons

in the same class cannot be treated alike. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417; *Ward* v. *Maryland,* 79 U. S. 418; *Yick Wo* v. *Hopkins,* 118 U. S. 358.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Supreme Court of Oregon directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of the said Supreme Court of Oregon, affirming the judgment of conviction entered by the Circuit Court for Multnomah County, Oregon, be here set aside and petitioner dismissed from custody; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

ROWENA THORNTON
Petitioner

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